



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
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PHILIP D. MURPHY  
Governor

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

**FINAL DECISION**

**September 24, 2019 Government Records Council Meeting**

John Sexton  
Complainant

Complaint No. 2016-293

v.

Middlesex County  
Custodian of Record

At the September 24, 2019 public meeting, the Government Records Council (“Council”) considered the September 17, 2019 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Both the Complainant and Custodian’s Counsel complied with the Council’s March 26, 2019 Interim Order. Specifically, the parties timely submitted their questionnaires. Additionally, Custodian’s Counsel timely submitted the registration forms for *in camera* review and simultaneously provided certified confirmation of compliance to the Council Staff.
2. The Custodian has borne her burden of proving that disclosure of the responsive contact information contained on the responsive registration forms would violate the privacy exempt present in OPRA. N.J.S.A. 47:1A-1; Burnett v. Cnty. of Bergen, 198 N.J. 408, 422-23, 427 (2009); Schechter v. Thomas Edison State Coll., GRC Complaint No. 2013-174 (January 2014). As such, the Custodian lawfully denied access to said list. N.J.S.A. 47:1A-6.
3. Because the contact information contained within the registration forms is exempt under the privacy interest exemption, the GRC declines to perform a full *in camera* review of the contents of said forms. The GRC also notes that it need not address whether the Custodian should have redacted and disclosed every form because the Complainant was in possession of a blank copy of same. See Bart v. City of Paterson Hous. Auth., 403 N.J. Super. 609, 619 (App. Div. 2008).
4. Because no denial of access occurred, the Council should decline to address whether the Custodian knowingly and willfully violated OPRA under the totality of the circumstances.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk's Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the  
Government Records Council  
On The 24<sup>th</sup> Day of September 2019

Robin Berg Tabakin, Esq., Chair  
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: September 27, 2019**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director  
September 24, 2019 Council Meeting**

**John Sexton<sup>1</sup>  
Complainant**

**GRC Complaint No. 2016-293**

v.

**Middlesex County<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Inspection or electronic copies via e-mail of attendee registration forms for a conference entitled “Bakken/Ethanol In Transit – Foam Firefighting Symposium” (“Symposium”) held at the Middlesex County (“County”) Fire Academy on September 23, and 24, 2016.

**Custodian of Record:** Amy Petrocelli  
**Request Received by Custodian:** October 28, 2016  
**Response Made by Custodian:** November 4, 2016  
**GRC Complaint Received:** November 10, 2016

**Records Submitted for *In Camera* Examination:** Registration forms for the Symposium.

**Background**

**March 26, 2019 Council Meeting:**

At its March 26, 2019 public meeting, the Council considered the March 19, 2019 Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The GRC must conduct an *in camera* review of responsive registration forms to determine the validity of the Custodian’s assertion that the record was exempt under OPRA pursuant to the privacy interest exemption. N.J.S.A. 47:1A-1. See Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by Jeanne-Marie Scollo, Esq. (New Brunswick, NJ).

2. **The Custodian shall deliver<sup>3</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records, a document or redaction index<sup>4</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,<sup>5</sup> that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
3. The GRC will need to conduct a balancing test to determine whether the Custodian unlawfully denied access to the responsive registration forms. Thus, the Complainant and Custodian shall submit responses to their above-respective balancing test questionnaires.
4. **Both the Complainant and Custodian shall comply with conclusion No. 3 above within five (5) business days from receipt of the Council's Interim Order and simultaneously deliver<sup>6</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Council Staff.<sup>7</sup>**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

#### Procedural History:

On March 29, 2018, the Council distributed its Interim Order to all parties on. On April 1, 2019, Custodian's Counsel e-mailed the Government Records Council ("GRC") advising that she would reply on the County's behalf because the Custodian was out on extended leave. Counsel also sought additional time to respond to the Council's Order. On April 2, 2019, the GRC granted an extension of time through April 11, 2019.

On April 4, 2019, the Complainant submitted his balancing test questionnaire and some additional background on the reasoning for his OPRA request. The Complainant stated that on November 4, 2016, he sent an e-mail to the Custodian and Counsel expressing that that a company his organization did business with asked them to attend the Symposium. The Complainant noted that the County advised him that vendors were not allowed to attend the event. The Complainant stated that he expressed to the Custodian and Counsel that barring bidders from attending the

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<sup>3</sup> The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives them by the deadline.

<sup>4</sup> The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

<sup>5</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

<sup>6</sup> The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

<sup>7</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

Symposium or from accessing the registration forms presented an advantage to Combat Support Systems (“CSB”) and National Foam (“NF”), the vendors providing the training.

The Complainant also provided the following responses:

**1. Why do you need the requested record(s) or information?**

**Response:** The Complainant stated that he needed the registration forms to make it easier to develop a marketing list and put him in “the same position” as CSB and NF. The Complainant noted that both companies sold the products mentioned on the registration forms. The Complainant also argued that the County allowed both companies to “advertise . . . in the top right corner of the registration form.” The Complainant noted that he attached a blank copy of the registration form for review.

**2. How important is the requested record(s) or information to you?**

**Response:** The Complainant averred that he expected the information to be dated, but that disclosure would still save him time spent on searching for it by other means.

**3. Do you plan to redistribute the requested record(s) or information?**

**Response:** The Complainant stated that he would not redistribute the information contained on the registration forms.

**4. Will you use the requested record(s) or information for unsolicited contact of the individuals named in the government record(s)?**

**Response:** The Complainant stated that he would use the records for unsolicited contact in the same way that any salesman would use the information.

On April 10, 2019, Custodian Counsel responded to the Council’s Interim Order on behalf of the Custodian. Therein, Counsel certified that she was providing nine (9) copies of the responsive registration forms. Counsel noted that she did not include a document index because the Custodian did not disclose any records with redactions.

Counsel stated that the County bid out the Symposium per the Local Public Contracts Law. N.J.S.A. 40A:11-4. Counsel stated that the County received two (2) bids and chose CSB as the “lowest responsible bidder.” Counsel stated that CSB placed its logo on the registration form and was copied on all forms submitted because that company was providing the training. Counsel noted that the form clearly indicated to registrants that their information would be shared with CSB. Counsel disputed Complainant’s position that CSB was given any advantage that would be cured by disclosing the forms to him. Counsel argued that the Complainant’s logic was flawed; CSB was a successful bidder and trainer at the Symposium, and “was not merely an attendee.” Counsel thus argued that the Complainant and CSB did not represent vendors in “equal standing.”

Counsel averred that the County maintains its position that the registration forms were exempt from disclosure. Counsel asserted that a vast majority of the addresses on the forms were single family homes. Counsel asserted that the many of the participants included their personal information with the intention of receiving useful information from Office of the Fire Marshal. Counsel further noted that many of the e-mail addresses appeared personal in nature based on their suffixes. Counsel also asserted that the presence of personal e-mail addresses led her to believe that the phone numbers were equally personal.

On April 12, 2019, on behalf of the Custodian, Counsel resubmitted a balancing test questionnaire providing the following responses:<sup>8</sup>

**1. The type of record(s) requested.**

**Response:** Counsel stated that the responsive records were registration forms filled out by attendees of the Symposium, a voluntary training held by the County and Office of the Fire Marshal. Counsel stated that the County contracted with a third-party vendor to perform the training. Counsel stated that attendees included various firefighting instructors and emergency services personnel from the County and surrounding states.

**2. The information the requested records do or might contain.**

**Response:** Counsel averred the registration forms contain general information about the event, as well as personal information completed by each attendee to include:

Department:  
Applicant Name:  
E-mail Address:  
Contact Phone Number:  
Mailing Address:

**3. The potential harm in any subsequent non-consensual disclosure of the requested records.**

**Response:** Counsel argued that it is likely Complainant would use the information to contact the attendees for solicitation purposes, which the County had a “duty to prevent.” Counsel argued that much of the contact information was personal.

**4. The injury from disclosure to the relationship in which the requested record was generated.**

**Response:** Counsel averred that attendees did not expect their personal information to be shared with the public. Counsel argued that disclosure of the contact information, to include identity and place of business, may deter individuals from attending future trainings hosted by the County. Counsel further asserted that once disclosed, the County had no control over unauthorized contact with the attendees at home or on their personal phones.

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<sup>8</sup> Counsel noted that the balancing test responses were somehow separated from the *in camera* packet.

**5. The adequacy of safeguards to prevent unauthorized disclosure.**

**Response:** Counsel stated that the Complainant has clearly intended to use the registration form information to create a marketing list and engage in unsolicited contact with attendees. Counsel thus argued that redaction of only the mailing address, telephone number, and e-mail address would be inadequate. Counsel argued that disclosure would be inappropriate due to the Complainant's intent, which the County was not obligated to facilitate under OPRA.

**6. Whether there is an express statutory mandate, articulated public policy or other recognized public interest militating toward access.**

**Response:** Counsel stated that N.J.S.A. 47:1A-1 and Executive Order No. 21 (Gov. McGreevey 2002) ("EO 21") require public agencies to safeguard a citizen's personal information. Counsel further argued that disclosure would give an advantage to bidders and competitors; thus, disclosure was prohibited under N.J.S.A. 47:1A-1.1.

On the same day, the Complainant e-mailed the GRC clarifying that his company would never qualify for the bid process that CSB went through. The Complainant specifically stated that his company sells a product that could not meet the basic bid requirements. The Complainant thus maintained his position that disclosure would not result in an advantage to bidders and competitors. On April 16, 2019, the Complainant e-mailed additional arguments against the County's "advantage to bidders and competitors" position.

**Analysis**

**Compliance**

At its March 26, 2019 meeting, the Council ordered the Custodian to provide the Council for *in camera* review nine (9) copies of all withheld registration forms. The Council further required the Custodian to and simultaneously provide certified confirmation of compliance . . . to the Council Staff." The Council also ordered balancing test questionnaires from both parties. On March 28, 2019, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the parties' responses were due by close of business on April 4, 2019. Thereafter, at Custodian Counsel's request, the GRC extended the deadline to April 11, 2019.

On April 4, 2019, the Complainant sent his balancing test questionnaire to the GRC via e-mail. On April 11, 2019, Custodian's Counsel complied with the Council's Order by providing nine (9) copies of the registration forms to the GRC, as well as certified confirmation of compliance. Thereafter, on April 12, 2019, Counsel resubmitted her balancing test questionnaire, asserting that same was accidentally separated from the *in camera* packet at mailing.

Upon review of the forgoing, the parties substantially complied with the Council's Order. Specifically, the Complainant timely submitted his balancing test questionnaire. Additionally, Custodian's Counsel timely submitted her *in camera* packet. The evidence of record further

suggests that Counsel believed the balancing test was included in said packet. After being alerted to the fact that it was not, Counsel promptly cured the issue.

Therefore, both the Complainant and Custodian's Counsel complied with the Council's March 26, 2019 Interim Order. Specifically, the parties timely submitted their questionnaires. Additionally, Custodian's Counsel timely submitted the registration forms for *in camera* review and simultaneously provided certified confirmation of compliance to the Council Staff.

### **Unlawful Denial of Access**

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request "with certain exceptions." N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful. N.J.S.A. 47:1A-6.

#### **Privacy Balancing Test**

OPRA provides that "a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy. . ." N.J.S.A. 47:1A-1. As privacy interests are at issue in this matter, the GRC asked both the Complainant and the Custodian to respond to balancing test questions so the Council could employ the common law balancing test established by the New Jersey Supreme Court in Doe v. Poritz, 142 N.J. 1 (1995). The New Jersey Supreme Court has explained that N.J.S.A. 47:1A-1's safeguard against disclosure of personal information is substantive and requires "a balancing test that weighs both the public's strong interest in disclosure with the need to safeguard from public access personal information that would violate a reasonable expectation of privacy." Burnett v. Cnty. of Bergen, 198 N.J. 408, 422-23, 427 (2009).

When "balanc[ing] OPRA's interests in privacy and access" courts consider the following factors:

(1) the type of record requested; (2) the information it does or might contain; (3) the potential for harm in any subsequent nonconsensual disclosure; (4) the injury from disclosure to the relationship in which the record was generated; (5) the adequacy of safeguards to prevent unauthorized disclosure; (6) the degree of need for access; and (7) whether there is an express statutory mandate, articulated public policy, or other recognized public interest militating toward access.

[Id. at 427 (quoting Doe v. Poritz, 142 N.J. 1, 88 (1995).]

This test will enable the Council to weigh the County's asserted need to protect the privacy of individuals against the Complainant's asserted need to access the contact information contained within the registration forms.



**A. *Courts Have Required that Certain Personal Information Be Redacted From Records Released in Response to an OPRA Request Where OPRA’s Interest in Privacy Outweighs the Interest in Access***

In Burnett, a commercial business requested approximately eight million pages of land title records extending over a twenty-two year period; the records contained names, addresses, social security numbers, and signatures of numerous individuals. Burnett, supra, 198 N.J. at 418. After balancing the seven factors, the Court “[ou]nd that the twin aims of public access and protection of personal information weigh in favor of redacting [social security numbers] from the requested records before releasing them” because “[i]n that way, disclosure would not violate the reasonable expectation of privacy citizens have in their personal information.” Id. at 437. The Court emphasized that the “balance [wa]s heavily influenced by concerns about the bulk sale and disclosure of a large amount of social security numbers—which [the commercial business] admittedly does not need, and which are not an essential part of the records sought.” Id. at 414. Moreover, “the requested records [we]re not related to OPRA’s core concern of transparency in government.” Ibid.

Similarly, the Appellate Division has concluded that the identity of an individual who attempted suicide by jumping off a bridge should not be disclosed in an OPRA request seeking police and fire department reports about the incident under Burnett. Alfano v. Margate City, 2012 N.J. Super. Unpub. LEXIS 2179, 1-2, 8-10 (App. Div. 2012).

**B. *Courts Have Not Required Redaction of Certain Personal Information From Records Released in Response to an OPRA Request Where OPRA’s Interest in Access Outweighs the Interest in Privacy***

In contrast, the Appellate Division has affirmed a trial court’s determination that the identity of a person who called 911 complaining about illegal parking blocking his driveway should not be redacted when the owner of the car filed an OPRA request seeking a copy of the 911 call under Burnett. Ponce v. Town of W. New York, 2013 N.J. Super. Unpub. LEXIS 436, 3-4 (App. Div. 2013). The trial judge explained that

[t]he type of information requested by [the car owner] is not particularly sensitive or confidential. When the caller made a complaint [to] the police department that someone was blocking his or her driveway he or she could reasonably expect that his name may be revealed in connection with the complaint. There has not been evidence presented to suggest that revealing the caller's identity or the call itself would result in any serious harm or confrontation between the caller and the - - [sic] and the [car owner]. It may in fact be helpful for the [car owner] to know the information in order to challenge his parking violation.

[Id. at 7-8.]

The Appellate Division emphasized that the city’s arguments against disclosure of the caller’s identity were “predicated on the notion that if [the car owner] learns the identity of his accuser he will retaliate in some fashion, thus discouraging the average person from reporting

incidents to the police via the 911 emergency system.” Id. at 9. However, the city “ha[d] not presented any evidence of past hostility between these two individuals” and the court emphasized that “[a]bsent compelling reasons, which are conspicuously absent in this record, few can argue that in a free society an accused is not entitled to know the identity of his accuser.” Id. at 9-10. Therefore, the court concluded that “[n]one of the concerns in favor of confidentiality articulated by the Court in Burnett, supra, 198 N.J. at 427, [we]re applicable” and affirmed the trial court’s decision ordering disclosure of the caller’s identity. Ponce, supra, at 10.

Similarly, the Appellate Division has concluded that addresses should not be redacted from a mailing list of self-identified “senior citizens” compiled by a county to contact those individuals through a newsletter. Renna v. Cnty. of Union, 2012 N.J. Super. Unpub. LEXIS 342, 1, 11-12 (App. Div. 2012). A website operator filed an OPRA request seeking access to that mailing list so that she could disseminate information in furtherance of non-profit activities related to monitoring county government. Id. at 2. The court applied the Burnett factors. Id. at 11. The first two factors weighed in favor of disclosure, because “the intent and spirit of OPRA are to maximize public awareness of governmental matters” and “the interest in the dissemination of information, even that unrelated to senior matters, outweighs a perceived notion of expectation of privacy.” Id. at 12.

**C. *Application of the Burnett Factors to Balance OPRA’s Interests in Privacy and Access in the Present Matter Dictates that Contact Information Within the Responsive Registration Forms Not Be Disclosed***

The present matter requires application of the Burnett factors to balance OPRA’s dual interests in privacy and access as applied to the release of contact information from the registration forms at issue here.

i. *Burnett Factors One and Two*

The first and second Burnett factors require consideration of the records requested, and the type of information contained therein, respectively. The subject OPRA request sought registration forms for the Symposium. The information contained therein is “Department,” “Applicant Name,” “E[-]mail Address,” “Contact Ph. Number,” and “Mailing Address.” Counsel asserted that a vast majority of the contact information appeared personal in nature.

ii. *Burnett Factors Three and Four*

The third and fourth Burnett factors address the potential for harm in subsequent nonconsensual disclosure of the contact information contained in the registration forms, and the injury from disclosure to the relationship in which the record was generated, respectively.

Regarding the potential harm in nonconsensual disclosure, Counsel argued that the Complainant intended to use the forms for solicitation and that the County had a “duty to prevent” the use of this information. Counsel further argued that much of the information included on the forms was personal in nature. As to the injury from disclosure, Counsel noted that attendees were alerted that their contact information would be shared with CSB. Counsel asserted that the attendees did not expect their information to be shared with the general public. Counsel contended

that disclosure here may deter individuals from attending future valuable trainings held by the County.

Conversely, the Complainant averred that he would not redistribute the information; rather, he would use it to create a marketing list. The Complainant further noted that he intended to use the contact information for unsolicited contact in “the same way that any salesman would use the information.”

The GRC addressed the disclosure of an event registration list in Schechter v. Thomas Edison State Coll., GRC Complaint No. 2013-174 (January 2014). There, the Council held that these factors weighed against disclosure of the registrants’ names and addresses. The Council reasoned that it had significant concerns about the potential harm from disclosure. Id. at 7. It should be noted that an additional reason in weighing these factors against disclosure was that the complainant did not submit a balancing test questionnaire. However, the Council also noted that its decision was based on “substantive evidence provided by the Custodian . . .” Id. at 7.

Under OPRA, a “public agency” has a responsibility to safeguard against unsolicited contact where possible. Doe, 142 N.J. at 82 (1995). Significant concerns about the potential harm from disclosure of the registration forms exist here. In fact, the Complainant has stated that he intended to create a marketing list for solicitation purposes. Further, the injury from disclosure is considerable; the GRC is persuaded that disclosure here could deter interested parties from registering for County events in the future. That another vendor received this information, especially within the confines of a contract award, does not open attendees’ contact information to public consumption. For this reason, the GRC finds that factors three and four weigh in favor of non-disclosure.

iii. Burnett Factor Five

The fifth Burnett factor requires consideration of the adequacy of safeguards to prevent unauthorized disclosure of the contact information contained in the registration forms. Custodian’s Counsel responded that the Complainant’s clear intent to use the forms for unsolicited contact did not allow the County to disclose them, even in redacted form. The GRC again notes that the Complainant expressed that he would not redistribute the contact information.

When addressing how this factor applies to personal information, the GRC has militated towards non-disclosure, even in cases where the Council ordered partial disclosure of information. See Mayer v. Borough of Tinton Falls (Monmouth), GRC Complaint No. 2008-245 (Interim Order dated April 8, 2010) at 20; Levitt v. Montclair Parking Auth. (Essex), GRC Complaint No. 2012-150 (June 2013). The GRC similarly finds here that, regardless of the Complainant’s non-distribution statement, there are no safeguards in place to prevent the unauthorized disclosure of the attendee information at any point after disclosure. Further, disclosure of any information contained within the registration forms would invite unsolicited contact, as discussed below. Thus, factor five weighs in favor of non-disclosure.

iv. Burnett Factor Six

The sixth Burnett factor addresses the degree of need for access to the registration form information. In his balancing test questionnaire, the Complainant stated that he needed the registration forms to make it easier to create a marketing list and put him on equal footing with CSB and NF. The Complainant argued that both companies were allowed to “advertise” on the registration form and received all registrant information. The Complainant included a blank copy of the form for the GRC’s review. The Complainant also argued that disclosure would save him time trying to seek the contact information through other sources.

In weighing this factor, the GRC notes that the Council has previously held against disclosure where complainants asserted that they would use personal information for unsolicited commercial contact. For instance, in Knehr v. Twp. of Franklin (Somerset), GRC Complaint No. 2012-38 (December 2012), the complainant stated in his Denial of Access Complaint that he wished to obtain address information to send marketing materials to registered pet owners. The Council, noting that it did not need to perform a balancing test, held that the custodian lawfully denied access to the responsive information. Citing Bernstein v. Borough of Park Ridge, GRC Complaint No. 2005-99 (July 2005) and Faulkner v. Rutgers Univ. of N.J., GRC Complaint No. 2007-149 (May 2008). However, the GRC has also weighed this factor against disclosure where complainants generally asserted a need that would result in unsolicited contact of any kind. See Schechter, GRC 2013-174. See also *e.g.* Merino v. Ho-Ho-Kus, GRC Complaint No. 2003-110 (July 2004); Levitt, GRC 2012-150.

This complaint is directly on point with Schechter, GRC 2013-174 in principle. Specifically, disclosure of event attendee contact information is the threshold issue in both complaints. This complaint departs from Schechter in that the complainant there did not submit a balancing test questionnaire, whereas the Complainant here did. Notwithstanding, the custodian in Schechter was able to provide definitive proof that the complainant intended to contact registrants in an unsolicited manner because she had already done so. Here, the Complainant definitively admitted that he would build a marketing list to engage in unsolicited contact.

Further, the instant complaint provides similar qualities to Knehr and Faulkner in that the Complainant here has expressed his interest in utilizing the contact information for marketing purposes. The Complainant’s motivation is like the need asserted in the aforementioned complaints. That disclosure would save the Complainant time in tracking down the same contact information speaks to a question of convenience, as opposed to “maximiz[ing] public awareness of governmental matters.” Renna v. Cnty. of Union, 2012 N.J. Super. Unpub. LEXIS 342.

Aside from the supporting case law above, the question of whether personal information is contained in the registration forms looms heavily in the GRC’s decision to weigh this factor against disclosure. A review of the forms, which were provided for *in camera* review support the potential that many of the e-mails could be personal in nature. However, there also appears to be a fair number of governmental e-mail addresses. It is unclear whether the remaining mailing address information and telephone numbers were personal in nature. Notwithstanding, the GRC is persuaded that disclosure of all registration information would invite unsolicited contact. Specifically, the Complainant asserted disclosure would saver him time from seeking contact

information in other ways. Thus, it is implicit that disclosure of either the “Department” and/or “Applicant Name” would invite the Complainant to contact those individuals through other means. Such a disclosure would essentially circumvent the County’s attempt to protect attendee privacy. Thus, factor six weighs against disclosure for the reasons stated above.

The GRC notes that the “advantage” arguments presented by the parties do not impact the balancing test analysis here. Whether the Complainant receiving the information would allow him equal footing or an advantage over CSB and NF does not rise above those attendees’ right to privacy in this complaint.

v. *Burnett Factor Seven*

The seventh Burnett factor requires consideration as to whether an express statutory mandate, articulated public policy, or other recognized public interest militating toward access to the contact information exists. Here, Custodian’s Counsel cited to N.J.S.A. 47:1A-1 and EO 21 in stating that public agencies were required to safeguard a citizen’s personal information. Counsel also argued that disclosure would represent an advantage to bidders and competitors. The Complainant conversely argued that CSB and NF gained the unfair advantage by having access to the registration forms. The Complainant contended that disclosure would level the playing field with CSB and NF.

The forgoing provides that this factor militates towards non-disclosure of personal information. The GRC is also not persuaded that the Complainant’s arguments against the “advantage” exemption amounts to an “express statutory mandate, articulated public policy, or other recognized public interest militating toward access.” Thus, this factor also militates towards non-disclosure.

vi. *Balancing of the Burnett Factors*

On balancing the Burnett factors in this complaint, OPRA’s dual object to provide both public access and protection of personal information weigh against disclosure of the contact information contained in the registration forms in their totality. Most notably, unsolicited contact is implicit here, as the Complainant intends to create a marketing list. The Symposium attendees have an inherent privacy interest in not having their contact information shared for such a purpose. The GRC also agrees that disclosure could chill prospective attendees from registering for County-sponsored events if they knew said information would be disclosed. Further, the disclosure of the list does not maximize the Complainant’s knowledge in “government.” If the Complainant wished to obtain a list of attendees registering for County-sponsored events, he could always attempt to work with the County to contract for his own training.

Therefore, the Custodian has borne her burden of proving that disclosure of the responsive contact information contained on the responsive registration forms would violate the privacy exempt present in OPRA. N.J.S.A. 47:1A-1; Burnett, 198 N.J. at 422-23, 427; Schechter, GRC 2013-174. As such, the Custodian lawfully denied access to said list. N.J.S.A. 47:1A-6.

Additionally, because the contact information contained within the registration forms is exempt under the privacy interest exemption, the GRC declines to perform a full *in camera* review of the contents of said forms. The GRC also notes that it need not address whether the Custodian should have redacted and disclosed every form because the Complainant was in possession of a blank copy of same. See Bart v. City of Paterson Hous. Auth., 403 N.J. Super. 609, 619 (App. Div. 2008).

Finally, because no denial of access occurred, the Council should decline to address whether the Custodian knowingly and willfully violated OPRA under the totality of the circumstances.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Both the Complainant and Custodian's Counsel complied with the Council's March 26, 2019 Interim Order. Specifically, the parties timely submitted their questionnaires. Additionally, Custodian's Counsel timely submitted the registration forms for *in camera* review and simultaneously provided certified confirmation of compliance to the Council Staff.
2. The Custodian has borne her burden of proving that disclosure of the responsive contact information contained on the responsive registration forms would violate the privacy exempt present in OPRA. N.J.S.A. 47:1A-1; Burnett v. Cnty. of Bergen, 198 N.J. 408, 422-23, 427 (2009); Schechter v. Thomas Edison State Coll., GRC Complaint No. 2013-174 (January 2014). As such, the Custodian lawfully denied access to said list. N.J.S.A. 47:1A-6.
3. Because the contact information contained within the registration forms is exempt under the privacy interest exemption, the GRC declines to perform a full *in camera* review of the contents of said forms. The GRC also notes that it need not address whether the Custodian should have redacted and disclosed every form because the Complainant was in possession of a blank copy of same. See Bart v. City of Paterson Hous. Auth., 403 N.J. Super. 609, 619 (App. Div. 2008).
4. Because no denial of access occurred, the Council should decline to address whether the Custodian knowingly and willfully violated OPRA under the totality of the circumstances.

Prepared By: Frank F. Caruso  
Executive Director

September 17, 2019



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
101 SOUTH BROAD STREET  
PO Box 819  
TRENTON, NJ 08625-0819

PHILIP D. MURPHY  
Governor

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

INTERIM ORDER

March 26, 2019 Government Records Council Meeting

John Sexton  
Complainant

Complaint No. 2016-293

v.

Middlesex County  
Custodian of Record

At the March 26, 2019 public meeting, the Government Records Council (“Council”) considered the March 19, 2019 Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The GRC must conduct an *in camera* review of responsive registration forms to determine the validity of the Custodian’s assertion that the record was exempt under OPRA pursuant to the privacy interest exemption. N.J.S.A. 47:1A-1. See Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).
2. **The Custodian shall deliver<sup>1</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records, a document or redaction index<sup>2</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,<sup>3</sup> that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council’s Interim Order.**
3. The GRC will need to conduct a balancing test to determine whether the Custodian unlawfully denied access to the responsive registration forms. Thus, the Complainant and Custodian shall submit responses to their above-respective balancing test questionnaires.
4. **Both the Complainant and Custodian shall comply with conclusion No. 3 above within five (5) business days from receipt of the Council’s Interim Order and**

<sup>1</sup> The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives them by the deadline.

<sup>2</sup> The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

<sup>3</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

**simultaneously deliver<sup>4</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Council Staff.<sup>5</sup>**

5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the  
Government Records Council  
On The 26<sup>th</sup> Day of March, 2019

Robin Berg Tabakin, Esq., Chair  
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: March 28, 2019**

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<sup>4</sup> The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

<sup>5</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff  
March 26, 2019 Council Meeting**

**John Sexton<sup>1</sup>  
Complainant**

**GRC Complaint No. 2016-293**

v.

**Middlesex County<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Inspection or electronic copies via e-mail of attendee registration forms for a conference entitled “Bakken/Ethanol In Transit – Foam Firefighting Symposium” (“Symposium”) held at the Middlesex County (“County”) Fire Academy on September 23, and 24, 2016.

**Custodian of Record:** Amy Petrocelli  
**Request Received by Custodian:** October 28, 2016  
**Response Made by Custodian:** November 4, 2016  
**GRC Complaint Received:** November 10, 2016

**Background<sup>3</sup>**

**Request and Response:**

On October 27, 2016, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On November 4, 2016, Custodian’s Counsel responded in writing on behalf of the Custodian denying access to the responsive records. Counsel noted that all attendees’ forms included information on their official capacity, but also personal information. Counsel stated that the attendees did not intend for the County to share their personal information, which could be used for solicitation purposes. Counsel speculated that attendees may be deterred from attending future events if they believed their information would be disclosed. Finally, Counsel stated that the forms were exempt under the “advantage to competitors and bidders” exemption. N.J.S.A. 47:1A-1.1.

On the same day, the Complainant e-mailed Counsel stating that he received the denial and wanted to make the County aware of the purpose of the request. The Complainant stated that the County denied his attendance at the Symposium based on a policy of not allowing vendors. The

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by Jeanne-Marie Scollo, Esq. (New Brunswick, NJ).

<sup>3</sup> The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Council Staff the submissions necessary and relevant for the adjudication of this complaint.

Complainant noted, however, that the registration forms were to be sent to the County and cc'd to an employee at "Combat Support Products" ("CSP"). The Complainant asserted that it was unclear how disclosure of the registration forms would present an advantage to bidders or competitors; in fact, the Symposium unfairly benefitted only one vendor. The Complainant contended that CSP was provided a "marketing list" for social media promotion: this presents an obvious disadvantage to other vendors.

#### Denial of Access Complaint:

On November 10, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that the Custodian unlawfully denied access to the responsive forms. The Complainant stated that the forms did not require any personal information; rather, attendees were only required to submit business-related department, name, e-mail address, telephone number and mailing address.

The Complainant also argued that the "advantage" exemption did not apply to the forms. The Complainant noted that his understanding of information not disclosable under the exemption included "proprietary commercial or financial information, trade secrets, details of bid proposals submitted, *etc.*" The Complainant asserted that he was not seeking to bid on any contracts issued by the County; thus, no competitive advantage existed. The Complainant argued that, contrary to the denial, CSP likely shared registration information. The Complainant asserted that it necessarily followed that the form information was not personal in nature. The Complainant asserted that he merely sought information already shared with another vendor.

#### Statement of Information:<sup>4</sup>

On February 24, 2017, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on October 28, 2016. The Custodian certified that Counsel responded in writing on her behalf responded on November 4, 2016 denying access to the requested forms.

The Custodian contended that she lawfully denied access pursuant to N.J.S.A. 47:1A-1 and Executive Order No. 21 (Governor McGreevey, 2002) ("EO 21"). The Custodian affirmed that the registration forms contained personal and professional information of third-party attendees, which was provided to "have the greatest chance of being contacted directly by the Office of the Fire Marshall." The custodian argued that disclosure would allow for unsolicited contact that could result from unwarranted redistribution of the information. The Custodian argued that if disclosed, the Council also had no safeguards against this redistribution.

The Custodian affirmed that the County endeavored to hold a training session on the use of Fire Fighting Foam. The Custodian certified that the County solicited bids for the session (Bid No. B-16-143) in accordance with the Local Public Contracts Law. N.J.S.A. 40A:11-4. The Custodian certified that CSP was the lowest bidder and, pursuant to the bid specifications, was awarded the contract. The Custodian averred that the County sent registration forms to potential

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<sup>4</sup> This complaint was referred to mediation on December 2, 2016. This complaint was referred back to the GRC for adjudication on February 15, 2017.

attendees notifying them that CSP was providing the training. The Custodian further averred that potential attendees were advised that CSP should be copied for targeting training purposes, and that the attendee information would be shared with that company. The Custodian argued that the attendees did not anticipate or consent to their information being shared with any other party.

The Custodian argued that the Complainant was “unwilling to accept . . . that bids were solicited[,] and a contract awarded.” The Custodian asserted that the Complainant did not submit a bid (presumably on behalf of his employer) and CSP was the successful bidder; CSP was not merely an attendee or recipient of a marketing list. The Custodian thus argued that the Complainant and CSP were not vendors in equal standing. The Custodian contended that the Complainant’s reasoning for requiring disclosure were flawed based on the forgoing.

### Analysis

#### Unlawful Denial of Access

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

In Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the Council<sup>5</sup> that accepted the custodian’s legal conclusion for the denial of access without further review. The Appellate Division noted that “OPRA contemplates the GRC’s meaningful review of the basis for an agency’s decision to withhold government records . . . . When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers.” Id. The Court stated that:

[OPRA] also contemplates the GRC’s *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the ‘Open Public Meetings Act,’ N.J.S.A. 10:4-6 to -21, it also provides that the GRC ‘may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.’ N.J.S.A. 47:1A-7(f). This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.

[Id. at 355.]

Further, the Court found that:

We hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal . . . There is no reason

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<sup>5</sup> Paff v. NJ Dep’t of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC's obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7(f), which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.

[Id.]

Here, the Complainant sought registration forms for an event held by the County. The Custodian initially denied access to the responsive registration forms based on the "advantage to competitors and bidders" exemption. N.J.S.A. 47:1A-1.1. However, the Custodian subsequently relied on the privacy interest exemption provided for in N.J.S.A. 47:1A-1 and EO 21 in her SOI. However, it is unclear exactly which information registrants were required to input on the form and whether same was personal in nature. For this reason, a "meaningful review" is necessary to determine whether the forms, or portion of, reasonably fall within the personal privacy exemption. Because it is unclear whether the responsive forms are comprised entirely of personal information, the GRC must review them in order to determine the full applicability of privacy exemption.

Therefore, the GRC must conduct an *in camera* review of responsive registration forms to determine the validity of the Custodian's assertion that the record was exempt under OPRA pursuant to the privacy interest exemption. N.J.S.A. 47:1A-1. See Paff, 379 N.J. Super. at 346.

Moreover, OPRA provides that "a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy. . ." N.J.S.A. 47:1A-1. See also EO 21.

When privacy issues are raised, the GRC has often employed the seven-factor balancing test conducted in Burnett v. Cnty. of Bergen, 198 N.J. 408 (2009) to determine whether an unlawful denial of access occurred. See Giannakis, GRC 2012-152. In order to effectively conduct this test, the GRC has typically required a complainant to submit a privacy balancing test questionnaire responding to the following:

- 1. Why do you need the requested record(s) or information?**
- 2. How important is the requested record(s) or information to you?**
- 3. Do you plan to redistribute the requested record(s) or information?**
- 4. Will you use the requested record(s) or information for unsolicited contact of the individuals named in the government record(s)?**

The GRC has also typically required a custodian to submit a privacy balancing test questionnaire simultaneously responding to the following:

- 1. The type of record(s) requested.**

2. **The information the requested records do or might contain.**
3. **The potential harm in any subsequent non-consensual disclosure of the requested records.**
4. **The injury from disclosure to the relationship in which the requested record was generated.**
5. **The adequacy of safeguards to prevent unauthorized disclosure.**
6. **Whether there is an express statutory mandate, articulated public policy or other recognized public interest militating toward access.**

The GRC has then utilized the parties' responses to conduct the balancing test. See Schechter v. Thomas Edison State Coll., GRC Complaint No. 2013-74 (January 2014); but see Smith v. N.J. Dep't of Banking & Ins., GRC Complaint No. 2014-301 (March 2015) (where the Council conducted a balancing test notwithstanding the complainant's failure to submit responses).

Here, and as noted above, the Custodian has relied on the privacy interest exemption provided for in N.J.S.A. 47:1A-1 and EO 21 for her denial of access. However, absent from the record before the Council are responses from both parties that would adequately allow the GRC to conduct a balancing test. For this reason, the GRC cannot determine whether an unlawful denial of access occurred without acquiring responses to the above-mentioned balancing test questionnaires.

Accordingly, the GRC will need to conduct a balancing test to determine whether the Custodian unlawfully denied access to the responsive registration forms. Thus, the Complainant and Custodian shall submit responses to their above-respective balancing test questionnaires.

### **Knowing & Willful**

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

### **Conclusions and Recommendations**

The Council Staff respectfully recommends the Council find that:

1. The GRC must conduct an *in camera* review of responsive registration forms to determine the validity of the Custodian's assertion that the record was exempt under OPRA pursuant to the privacy interest exemption. N.J.S.A. 47:1A-1. See Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).

2. **The Custodian shall deliver<sup>6</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records, a document or redaction index<sup>7</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,<sup>8</sup> that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
3. The GRC will need to conduct a balancing test to determine whether the Custodian unlawfully denied access to the responsive registration forms. Thus, the Complainant and Custodian shall submit responses to their above-respective balancing test questionnaires.
4. **Both the Complainant and Custodian shall comply with conclusion No. 3 above within five (5) business days from receipt of the Council's Interim Order and simultaneously deliver<sup>9</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Council Staff.<sup>10</sup>**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso  
Acting Executive Director

March 19, 2019

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<sup>6</sup> The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives them by the deadline.

<sup>7</sup> The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

<sup>8</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

<sup>9</sup> The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

<sup>10</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.